

May 27, 2005

Teng-cheng Wu
Technical Services Director
Mountain View Sanitary District
P. O. Box 2757
Martinez, CA 94553

**Re: Your Request for Advice
Our File No. A-05-092**

Dear Mr. Wu:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that the Commission does not provide assistance relating to past conduct. (Regulation 18329(b)(8)(A).)

QUESTION

As an employee of the Mountain View Sanitary District ("District"), would you be precluded from performing work in China as a paid consultant for the World Bank while you are on vacation from your job with the District?

CONCLUSION

The Act does not bar public officials from maintaining outside employment during their tenure as public officials. However, a conflict of interest under the Act can arise within the context of specific governmental decisions that have reasonably foreseeable material financial effects on one or more of an official's economic interests, including your business interests and sources of income to that business. If your economic interests are implicated in a governmental decision in your capacity as a public official, they may involve a conflict of interest as that term is defined by the Act. You have provided no facts to analyze a specific prospective factual situation.

In addition, we strongly suggest that you consult the District's statement of incompatible activities for guidelines when considering receiving outside income concurrent with your position with the District.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

You are currently employed by the Mountain View Sanitary District as a Technical Services Director. The District provides sewage collection and treatment services to portions of the City of Martinez and unincorporated areas. You plan to take a two week vacation to go to China and assist the City of Ningbo in their planning and design of two wastewater treatment plants. These plants are being designed and will be constructed with a loan from the World Bank. A condition of the loan requires someone not associated with either the World Bank or the Chinese government to review the plans before a loan is given. You will be paid by the World Bank to review the designs and also to act as a language facilitator, knowledgeable in both Chinese and wastewater treatment, between the Chinese government officials and officials at the World Bank. All communications regarding this offer have come from the World Bank. You have received no communication from Chinese officials and to your knowledge, the payment you receive will come entirely from the World Bank and will not be paid by the Chinese government.

ANALYSIS

As an employee of the District, you are considered a public official within the meaning of the Act. (Section 87103, regulation 18701.) The Act does not prohibit a public official from accepting employment outside of government. There are, however, other bodies of law that sometimes restrict such employment such as the law governing “Incompatible Activities of Local Officers and Employees.” (Gov. Code section 1126.) The Commission cannot offer advice in those areas and refers you instead to the Office of the Attorney General or to the District’s own counsel. In this letter, we limit our advice to the requirements of the Political Reform Act and, specifically, to the Act’s conflict-of-interest provisions.

Although the Act does not bar a public official from holding any form of private-sector employment, its conflict-of-interest rules prohibit (with limited exceptions) any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Sections 87100 and 87103.) In applying this law, the Commission employs an eight-step analytical framework to assist in determining whether a public official has a disqualifying conflict of interest.² (Regulation 18700(b)(1) - (b)(8).) The conflict-of-interest rules are, therefore, purely situational and require a specific pending governmental decision. Your inquiry, however, is a general one, made without reference to any specific governmental decision. Instead, the focus of your concern is the potential for your proposed work and subsequent payment from the World Bank to create a conflict of interest.

A public official has a disqualifying financial interest in a governmental decision, within the meaning of section 87100, if it is reasonably foreseeable that the decision will

² Enclosed is the Commission fact sheet entitled “*Can I Vote? Overview of the Conflicts Laws*,” which details all eight steps for your future reference.

have a material financial effect, distinguishable from its effect on the public generally, on the official, or on a member of the official's immediate family.

There are six kinds of economic interests from which conflicts of interest may arise. They are defined in section 87103 and regulations 18703-18703.5 and include:

- An interest in a business entity in which a public official has a direct or indirect investment³ of \$2,000 or more. (Section 87103(a), regulation 18703.1(a).)
- Any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), regulation 18703.2.)
- Any source of income, including promised income, to the public official which aggregates to \$500 or more within 12 months prior to the decision.⁴ (Section 87103(c), regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$360⁵ or more within 12 months prior to the decision. (Section 87103(e), regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family, also known as the "personal financial effects" rule. (Section 87103, regulation 18703.5.)

³ Section 87103 defines an "indirect investment" or interest as "any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater."

⁴ Note that whether income is reportable may be limited by a public official's disclosure category (located in the agency's conflict-of-interest code) or the agency's jurisdiction. We do not have any information to determine these issues.

⁵ The gift limit amount is adjusted biennially by the Commission to reflect changes in the Consumer Price Index. As of January 1, 2005, the amount is \$360. (Section 87103(e), regulation 18940.2.)

Payment from the World Bank as Income

The payment the World Bank intends to make to you may be classified as “income” under the Act.⁶ “Income” is broadly defined in section 82030 to include virtually any payment received where consideration of equal or greater value is provided to the source of the payment. Thus, if you provide consideration of equal or greater value to the World Bank in exchange for the payment, the payment would be considered income rather than a gift. We will assume for purposes of this letter that you will be providing equal or greater consideration as a paid consultant for the World Bank.

At this stage, we can say that there is always a potential for a conflict of interest at any time when you assume a governmental decisionmaking role where it is possible that the decision in question will have a material financial effect on your source of income. It would then be necessary to determine whether you were indeed making, participating in making, or influencing a governmental decision, whether it was foreseeable that the decision would impact one of these economic interests, and whether any such impact would amount to a “material financial effect,” as defined by statute and regulation. (Regulations 18700-18708.) We stress, however, that all of these elements must be found before a conflict of interest is established and it may well be unlikely that the World Bank will be implicated in any governmental decisions in which you may be involved. The existence of outside economic interests, alone, does not constitute a conflict of interest for a public official within the meaning of the Act.

If at any time you believe that you may have a financial interest in a specific, upcoming governmental decision, please feel free to contact me for further advice at (866) 275-3772.

Sincerely,

Luisa Menchaca
General Counsel

By: Adrienne Korchmaros
Political Reform Consultant
Technical Assistance Division

Enclosure

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⁶ Although, in general, payments by a third party for a public official’s travel are considered a gift subject to the \$360 per year gift limit, the Act defines “gift” as “any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received.” (Section 82028.) Your use of the term “paid consultant” in your letter requesting advice, leads us to believe you consider your payment to be income for your services rather than a gift. However, the determination of whether equal consideration has been provided is a factual one and must be made on a case-by-case basis. If an official claims that a payment is income and not a gift, the official has the burden of proving that the consideration provided was of equal or greater value than the payment received. (Section 82028, *supra*.)

